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Supreme Court of the United States

OCTOBER TERM, 1957

No. 459

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WITH APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Humble Oil & Refining Company, a Texas corporation, prays that a writ of *certiorari* issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The majority and dissenting opinions in the Court of appeals, printed App.[1] 2a, 19a, have not been reported.

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[1] "App." refers to the Appendix to this Petition. The lower Court's opinion in this case is brief and refers to companion decisions handed down the same day in *Deep South Oil Company of Texas* v. *Federal Power Commission*, No. 15,849, and *Shell Oil Company* v. *Federal Power Commission*, No. 15,900, as being dispositive of this case; therefore, the opinions in *Deep South* and *Shell* are also set forth in the Appendix hereto.

The majority and dissenting opinions of the Federal Power Commission (App. 41a, 54a), along with the opinion of the presiding Examiner who originally heard the case prior to appeal to the Commission and to the Court of Appeals, are set forth in the Transcript of Record (R. 340-357; 357-385; 130-191).

JURISDICTION

This case involves review of a judgment of the Court of Appeals for the Fifth Circuit and jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and § 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b).

DATE OF JUDGMENT BELOW

The judgment of the Court of Appeals was dated June 29, 1957, and entered on that same date (App. 1a).

QUESTION PRESENTED

Does the Federal Power Commission's jurisdiction over "sales in interstate commerce of natural gas for resale" include sales of raw casinghead gas, unsuitable for transportation in high-pressure lines and unfit for public consumption, to plant owners in the same state for processing, when such sales are made at the separators near the wellheads and prior to completion of "production or gathering" as those terms are used in § 1(b) of the Natural Gas Act, when the gas so sold is commingled with casinghead gas purchased from others before being gathered to a central point for processing, and when, after alteration in form and substance through processing, the residue gas *may*, in whole or in part, move in interstate commerce?

STATUTORY PROVISION INVOLVED

This case involves the Natural Gas Act, June 21, 1938, as amended, 52 Stat. 821-833, 15 U. S. C. Sections 717-717w. Pertinent provisions of the Statute are set forth in the Appendix page 76a.

STATEMENT OF THE CASE

This case arose before the Commission when, on November 26, 1954, Humble Oil & Refining Company filed a "Petition for Declaratory Order to Remove Uncertainties Concerning Sales of Casinghead Gas at or Near the Well Arising From the Issuance of Order No. 174-A and For Declaration of Status" (R. 431-449). Such Petition was filed pursuant to § 1.7(c) of the Commission's Rules of Practice and Procedure [18 C. F. R. 1.7(c)] and pursuant to § 5(d) of the Administrative Procedure Act.[2] Proceedings on such Petition were consolidated by the Commission for purposes of hearing with proceedings on similar petitions filed by the Deep South Oil Company of Texas and by Shell Oil Company. Hearings were held on the consolidated proceedings commencing on November 29, 1954, continuing through December 2, 1954, and resuming and concluding on January 10, 1955.

Casinghead gas is a gaseous substance inevitably produced along with oil from oil wells (App. below 4).[3] It always contains one or more impurities, such as carbon dioxide, nitrogen, helium, water vapor, free water, drilling mud, rust, sand, dirt, and various sulphur components, as well as valuable liquefiable con-

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[2] 60 Stat. 239 (1946), 5 U. S. C. 1004(d) 1952).

[3] "App. below" refers to the Appendix to Petitioner's Brief filed in the Court below and certified by the Clerk of the lower Court as a part of the record in this case.

stituents such as ethane, propane, butane, pentane, and heavier components including natural gasoline (App. below 4-5). Methane is the principal constituent of natural gas which is used as a domestic or industrial fuel and, accordingly, both the impurities and the valuable liquefiable constituents must first be removed from casinghead gas to produce residue or natural gas suitable for transmission and consumption (App. below 5).

Humble's request for status determination comprehended 48 contracts under which casinghead gas is sold by Humble wholly within the fields where processing in plants owned by others in or near such fields and constructed for such processing. Such contracts involve sales in many different oil fields and fall into three groups (App. below 25-61, 30):

1. In the first group are 36 casinghead gas contracts in which Humble is seller and the operator of a processing plant is buyer (App. below 26, 41-45), the same being written upon a form of casinghead gas contract entitled "Standard Form Revised—Adopted by The Natural Gasoline Association of America November 7, 1932," or upon "Standard Form 1939—Formerly Sponsored by The Natural Gasoline Association of America" or upon forms of contract substantially similar thereto.

2. In the second group are 8 contracts for the sale of casinghead gas to El Paso Natural Gas Company upon a form referred to as the "El Paso Form" (App. below 26, 45-46), such form being the Standard Form 1939 referred to above with a special clause relating to the payment for residue gas.

3. In the third group there are 4 sales of casinghead gas under contractual instruments referred to as Gas Division Orders (App. below 26, 46).

Under the "Standard Form" (App. below 49-69), the lease operator contracts to sell and deliver to the plant operator the raw casinghead gas available from the lease, with provision being made for return to the seller of sufficient residue gas to permit lease operations. The sales of raw casinghead gas are for processing (App. below 21-22). The point of delivery and at which title passes is the outlet of the lease separator, usually located on the lease (App. below 21). As consideration for the raw casinghead gas, the processing plant operator pays the lease operator: (a) an amount which is determined by what the plant operator receives from his sale of the liquid products recovered and sold, plus (b) a portion of the net proceeds received by the plant operator from his sale of whatever volume of residue gas remains after lease and plant uses (App. below 21). The amount of the consideration thus depends upon the price at which the plant owner makes his sale of the residue gas to whatever customer he may have, upon the richness of the casinghead gas, and, in some cases, upon the total volume of casinghead gas processed at the plant (App. below 21). The lease owner has no voice in the disposition of the residue gas, and the plant owner is not required to advise him as to how or to whom the gas is sold (App. below 22).

The "El Paso Form" (App. below 70-88) is substantially the same as the "Standard Form", the only basic difference being that under the "El Paso Form" the plant operator is required to account to the lease operator for all of the residue gas upon the basis of

certain prices set forth therein, such prices for the residue gas varying with the depth from which produced and the time period during which it is sold (App. below 28-29).

Sales of casinghead gas under the "Gas Division Orders" provide that the lease operator shall receive payment for his gas on the same basis that the plant operator receives payment for his own casinghead gas (App. below 32). As in the case of the "Standard" and "El Paso" forms, delivery of casinghead gas under the "Gas Division Order" is made at the outlet of the separator on the lease, and the seller has no control over the buyer's sale of residue gas (App. below 32-33). The seller, however, can terminate the gas division order at any time (App. below 33).

As pointed out above, under none of the contracts does Humble have control over the buyer's position of the gas. It was not until after deliveries had commenced under the contracts that Humble, in some instances only upon inquiry shortly prior to initiation of these proceedings, learned that some of the residue gas, commingled with the gas of other producers, was possibly being sold by the buyer to an interstate transmission line (App. below 31-32). In its Opinion, the Commission recognized this to be a fact (App. 42a). The record is devoid of any evidence that, at the time the sales were negotiated, either the seller or the buyer intended or knew that any of the gas would ultimately find its way into interstate commerce.

The record is replete with evidence describing the complex operations entailed in the processing of casinghead gas. Under typical operations, raw casinghead gas moves with the oil out of the wellhead through flow lines to a central point, usually on the

lease, and in a few instances on adjoining leases, at which are located lease stock tanks and separators wherein the crude oil is separated from the casinghead gas (App. below 7). The casinghead gas then moves out of the upper part of the separator, through a meter and, if it is not flared or burned, passes through a plant gathering system into the casinghead gas processing plant (App. below 7-8). Within the plant, the casinghead gas so gathered, commingled with casinghead gas from other leases, passes through a plant inlet meter to a scrubber where condensed liquids, certain impurities and other materials, including water, are removed (App. below 10). The casinghead gas thereafter passes out of the top of the scrubber through a set of compressors which increase pressure substantially and thence moves into the lower side of an absorber (App. below 11-12). The gas passes upward in the absorber counter-current to absorption oil, which is injected into the top portion of the absorber and which serves as a medium to remove the liquefiable constituents (App. below 12).

The stripped gas, from which the liquids and impurities have been removed, passes out of the top of the absorber as residue gas, (App. below 12). From this point, the residue gas may be returned to the lease for lease operations, or for repressuring the reservoir, or may be sold for local use, or may be delivered into the gathering lines of an interstate transmission company (App. below 12-12). In the latter event, or if the gas is to be moved any substantial distance or is to encounter low temperatures, it is necessary that it be further dehydrated. All of the residue gas produced in the plant is normally metered, regardless of its disposition (App. below 13).

After the conclusion of hearings on Humble's petition and others with which it was consolidated, the Presiding Examiner, on April 5, 1955, issued his decision in the consolidated proceedings (R. 130-191). Thereafter, an appeal was taken to the Commission, and on September 9, 1955, the Commission issued its Order and Opinion No. 284 (App. 41a; R. 339-357). Commissioner Digby filed a separate statement dissenting in part and concurring in part (App. 54a; R. 357-385). Both the Presiding Examiner and the Commission rejected the four contentions asserted by Humble, which were as follows:

> "1. The sales of casinghead gas are not in interstate commerce.
>
> "2. The sales involved are not for resale but are sales for processing.
>
> "3. The casinghead gas sold by petitioner is not the same product as the surplus residue gas which is sold by the buyer after intervention of processing.
>
> "4. The sales of casinghead gas and all facilities used in consummating such sales are within the production and gathering exemption of § 1(b) of the Natural Gas Act."

In short, the Commission held that the sales of raw casinghead gas were sales of "natural gas" as defined in the Act, that they were sales in interstate commerce for resale, and that the exemption of "production or gathering" under § 1(b) of the Act is not applicable to a sale even though admittedly made prior to completion of "production or gathering."

Thereafter, on October 4, 1955, Petitioner timely filed with the Commission its Application for Rehearing (R. 386-401) which was denied on November 4,

1955 (R. 425-426). Petitioner then, on December 19, 1955, sought review of the Commission's decision by the United States Court of Appeals for the Fifth Circuit, under provisions of § 19(b) of the Natural Gas Act (Petition for Review is a part of record in Court below).

As pointed out above, a two-judge majority of the Court below, Judge Brown dissenting, affirmed the order of the Commission on June 29, 1957. Such majority decision is sweeping in its effect. Any and all sales of a substance which includes natural gas would be rendered subject to regulation if any of the processed residue gas *may* eventually find its way into interstate commerce.

REASONS FOR GRANTING THE WRIT

I.

DECISION BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT

The questions presented here have not been previously adjudicated by this Court or any Court of Appeals other than the Court below. For the first time a fact situation is before this Court where a producer's sales of raw casinghead gas occur before the gas reaches a processing plant and before production and gathering have been completed. There are other facts surrounding the sales here involved which bring the novel issues into an even sharper focus. These accentuating facts will be developed below.

Before delineating the issues raised here, perhaps we should first define the area from which they arise, demonstrate their importance, and show that they have not been settled.

The only producer case under the Natural Gas Act which this Court has reviewed is *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U. S. 672 (1954). That case involved no wellhead sale of raw casinghead gas, but a sale of residue gas consummated after processing, a few hundred feet beyond the outlet of the processing plant. This Court specifically observed "that production and gathering, in the sense those terms are used in § 1(b), end before the sales by Phillips occur" (347 U. S. at 678). Here, the sales are made at the field separators and undisputedly are consummated before completion of "production" and prior to the commencement of "gathering." Both the Commission and the Court below so found this to be the case.[4]

Another difference in facts between *Phillips* and this case was also noted by Justice Minton in the former case:

> "Petitioners admit that Phillips engages in 'the sale in interstate commerce of natural gas for resale', as, of course, they must" (347 U. S. at 677).

Here, we deny (1) that the sales are in interstate commerce, (2) that they are sales of "natural gas", and (3) that they are for "resale."

In two other situations, this Court has applied the principle which it employed in *Phillips* in drawing the line between state and federal jurisdiction to regulate rates of natural gas sold in interstate commerce for resale. In both situations, the sales were, as in *Phillips*, expressly found to be made after completion of "production" and "gathering."

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[4] *Deep South* Opinion, App. 7a.

The first situation involved sales by one pipeline of gas-well gas which it produced to another interstate pipeline transmission company, without interruption of the flow for processing, and with knowledge and intent on the part of the seller at the time of the sale that the gas would move in interstate commerce and be resold. *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U. S. 682 (1947). There, field sales of gas-well gas by Interstate to three interstate pipeline companies, each of which thereafter transported the gas in interstate commerce for resale, were held to be subject to regulation under the Natural Gas Act. But Mr. Chief Justice Vinson, speaking for the Court, carefully pointed out that "By the time the sales are consummated, nothing further in the gathering process remains to be done" (331 U. S. at 692).

The second situation is found in two cases, one decided before and the other after *Phillips: Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157 (1954), and *Natural Gas Pipeline Company of America* v. *Panoma Corporation,* 349 U. S. 44 (1955). These cases respectively involved attempts by the State of Texas to impose a "gathering" tax and by the State of Oklahoma to set a minimum price on gas, both attempts coming *after* the completion of production, gathering, *and processing,* and as the gas entered an interstate transmission line for resale in another state. The efforts of the two States were held invalid as invasions of federal jurisdiction over interstate commerce.

Thus, we see that the reach of federal jurisdiction over sales of natural gas in interstate commerce has never been held to extend to sales made on the well-

side of the processing plant, and prior to the completion of production and gathering.

On the other side of the jurisdictional line of demarcation, we find one instance of a denial by this Court of federal jurisdiction over a sale by an admitted "natural gas company", made prior to processing and within "production or gathering" as exempted by § 1(b) of the Act. This was *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949), where a sale of leases, which is a sale of gas in place, was held to be a local transaction beyond the reach of the Commission's jurisdiction, although the leases were a part of the company's rate base and dedicated as a source of supply for, and made the basis of, certification of additional pipeline facilities. This decision was handed down notwithstanding the vigorous contention by the Commission that, unless the sale were held to be jurisdictional, that body could not effectively protect consumers against excessive rates nor assure them an adequate supply of gas. However, this Court respected the clear congressional intent as expressed by the exemption of production and gathering in § 1(b).

The unadjudicated no-man's land—out of which has grown, and may continue to grow, myriads of frustrating questions—lies then between sales of gas in place under dedicated leases, on the one hand, and sales made at the outlet side of processing plants, on the other. The blanket thesis of the Court below would extend the arm of federal control backward through the plant, through the gathering line, past the wellhead, down the well bore, and presumably even into the fugacious migration of gas molecules in the reservoir. This is not idle conjecture; it is an alarm

sounded in Judge Brown's dissenting opinion and also in Commisisoner Digby's dissent.

We turn now to the important and undecided questions raised by this case. There are a number of questions subsidiary to the question presented in the Court below and stated *supra*, page 2, namely:

(1) Does a "sale in interstate commerce" include a sale of raw casinghead gas to an intrastate processing plant where gas of many producers is gathered and processed, and a portion of the commingled residue *may*, at the election of the plant owner, be sold in interstate commerce?

(2) Is a sale of raw casinghead gas *for processing* a sale "for resale" when the seller has no control over the plant owner's disposition of the residue and a portion of the residue gas *may* ultimately find its way into interstate commerce?

(3) Is raw casinghead gas, unsuitable for high pressure transmission or for consumption, "natural gas" as that term is used and intended in the Act?

(4) Is the "production or gathering" exemption of § 1(b) of the Act applicable only to physical activities, facilities and properties used in production or gathering, to the complete exclusion of any and all sales made before interstate transmission commences?

(5) Do not knowledge and intent of the parties to a sale respecting the use to which the commodity will be put, or where it will go, have influential bearing on the question of local or interstate character of the transaction?

(6) Is it possible to construe the Act's use of "sale in interstate commerce for resale" to mean a sale for resale in interstate commerce?

The sweep of the decision below far exceeds the limits of the foregoing issues and hands down an expansive affirmative answer to the following broad question:

> Can it be said that any and all sales of a mineral product containing ethane and methane, regardless of the purpose for which made and regardless of interruptions in flow which may intervene, are to be regulated by the Commission if any molecule of the gas may eventually find its way into interstate commerce?

In the Court below we urged—as we contend here—that the clear language of the Natural Gas Act, together with its legislative history, reveal the intent of Congress to exclude from coverage of the Act local sales of the type here involved and to include only sales "in" interstate commerce. Morover, decisions of this Court dealing with analagous situations in other industries, we believe, require a holding here that these sales are local and intrastate in character and subject to state control. The basic principles were exhibited early and have long been followed. *Coe* v. *Errol,* 116 U. S. 517 (1886); *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172 (1923). Even a certainty of exportation out of state of residue gas after processing will not alone suffice to classify the sales of raw casinghead gas as sales "in" interstate commerce. *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245 (1922); *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284 (1927); *United States* v. *Yellow Cab Co.,* 332 U. S. 218 (1947); *Empresa Siderurgica, S. A.* v. *County of Merced,* 337 U. S. 154 (1949). In classifying a disputed sale, this Court has attached significance to the seller's knowledge and intent regarding the later movement of the commodity. *Superior Oil Co.* v. *Mississippi,* 280 U. S.

390 (1930). Most importantly, the fact that the sales here are sales for processing forbids their inclusion under § 1(b) as sales "in" interstate commerce. *Kidd* v. *Pearson*, 128 U. S. 1 (1888); *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895); *Crescent Cotton Oil Co.*, v. *Mississippi*, 257 U. S. 129 (1921); *Chassaniol* v. *City of Greenwood*, 291 U. S. 584 (1934); *Parker* v. *Brown*, 317 U. S. 341 (1943).

The foregoing paragraph suggests the background against which we think the transactions here must be appraised.

No doubt Respondent will contend, as it did in the Court below, that the questions set forth above have been settled by the following language from *Phillips*, often quoted to support efforts to extend regulation to all producer sales:

> ". . . [W]e believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company" (337 U. S. at 682).

But on the facts in *Phillips* this can mean only that a sale of *residue* gas, at the outlet of a processing plant, occurring *before* interstate transmission but *after* completion of production and gathering, is subject to regulation. Such is not the sale here presented, and the language cannot be twisted to cover such a sale occurring prior to processing and before production and gathering have been completed.

Before *Phillips*, the opinion prevailed generally in the industry and in the Commission itself that pro-

ducers, as such, were not subject to regulation under the Act. Indeed, Phillips contended that the Act was intended to apply only to interstate pipeline companies (347 U. S. at 681-682). The Commission had found that Phillips was not a "natural-gas company" as that term is used in the Act (347 U. S. at 675-676). The basic question in *Phillips*, then, was whether a producer, admittedly making a sale in interstate commerce for resale, which sale was expressly found by this Court to have been made after production and gathering had ended, was subject to regulation under the Act. In that case of first impression this Court held a producer to be regulable if, after completion of production, gathering and processing, he makes a sale in interstate commerce for resale. That case, however, plainly did not reach the issues posed here.

In *Panhandle Eastern*, *supra*, the Court granted *certiorari* in order to "consider the important question of the applicability of the Natural Gas Act" to a sale of dedicated gas leases (337 U. S. at 502). The question of the Act's applicability to a local sale of raw casinghead gas for processing, concededly made before completion of "production or gathering", involves even more important questions, and these questions have been multiplied and magnified by the broad sweep of the lower Court's decision.

II.

CASE INVOLVES MATTERS VITAL TO THE PUBLIC INTEREST

There are several aspects of the public interest readily apparent in this case. For example, consider the economic consequences of regulation upon the producing segment of the industry, in addition to the burden on and expense to the producers, large and small, to comply with the Commission's regulations in

filings and hearings.[5] Another aspect is presented by extension of federal control into areas where states have traditionally exercised jurisdiction to tax for support of local government and to regulate for purposes of conservation.[6] Still another feature is the tremendous administrative workload which regulation of thousands of producers and multiplied thousands of sales of the type here involved would impose on an already overloaded Federal Power Commission.[7]

Respondent will doubtless contend that these aspects of the public interest are overshadowed by the need for protection of consumer interests against excessive gas rates. We agree that reasonable rates, not only to protect the consumer but also to provide the incentive to the producing segment of the industry to assure an adequate supply, are a prime matter of public interest. But even this will not justify assertion of jurisdiction over a transaction to which the Act was not intended to apply, as in *Panhandle Eastern, supra.*

Even where the Natural Gas Act is applicable to a transaction, as in *Phillips* or *Interstate, supra*, there

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[5] U. S. Department of the Interior, Bureau of Mines, reports that in 1955 a total of 11,720 billion cu. ft. of gas were produced in the U. S. Of this total, 3878 billion cu. ft. or 33.1% was gas produced from oil wells, *i.e.*, casinghead gas ("Mineral Industry Surveys, Mineral Market Report MMS No. 2577", p. 5).

[6] The State of Texas filed in the Court below its Brief *Amici Curiae* in which it vigorously protested extension of federal regulation to the sales here involved. Grounds of the protest were (1) denial of the State's right to tax production, gathering and processing, (2) serious interference with State's conservation laws and programs and (3) reduction of State's revenues from royalties on State lands and from taxes on gas.

[7] Thirty-sixth Annual Report of the Federal Power Commission, 1956, particularly pp. 1-2, 5-6, 79-80, 85-88.

has been considerable debate over what should be the appropriate standard of rate making. This debate has continued over the years in the courts,[8] the Congress[9] and the Commission.[10] The gas industry participants in that debate contend that gas is a commodity, sale of which can best be regulated on the basis of market price determination, and that public-utility-type regulation is unsuitable for the risky and highly competitive gas producing segment of the industry.[11] The only rate-standard cases decided by the courts to date have been those involving pipeline-company-produced gas; no rate case has yet been decided by the courts involving sales by an independent producer.

Under competitive conditions which exist in the producing segment of the gas industry, gas prices arrived at as a result of arm's-length bargaining are market prices.[12] This means, therefore, that governmental intervention is not necessary to accomplish what many eminent jurists, legislators, and administrative officials believe to be a desirable purpose of federal regulation. We are confident we can demonstrate that the public interest will be adequately protected if, as Congress

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[8] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), particularly Justice Jackson's dissenting opinion, 320 U. S. at 628; *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810 (C. A. D. C. 1956) *cert.* den. 352 U. S. 829 (1957).

[9] Harris-O'Hara Bill, H. R. 8525, 85th Cong., 1st sess. (1957).

[10] See Judge Brown's comments below on FPC Docket R-142, terminated December 1, 1955 without determination of suitable standards for fixing producer rates (App. 33a-34a); Thirty-sixth Annual Report of the Federal Power Commission, 1956, p. 19.

[11] *E.G.*, Justice Jackson's dissenting opinion in *Hope* case, 320 U. S. at 628.

[12] H. Rept. No. 837, 85th Cong., 1st sess. (1957).

intended, gas sales made prior to completion of production, gathering, and processing are held to be matters that are local in nature, not subject to regulation under the Act. We submit that adequate protection will be afforded, if federal regulation is limited to wholesales of gas in interstate commerce made after completion of production, gathering and processing. As to the related facet of the public interest—*i.e.*, assurance of an adequate supply of gas—experience has proven that market price will furnish producers the incentive to conduct sufficient exploratory and producing operations to bring forth adequate supplies of gas.[13]

In connection with economic considerations, it can be demonstrated that regulation of wellhead sales of casinghead gas is neither feasible nor practicable and that present Commission attempts, in reality, do no more than regulate sales by processing plant owners to the interstate transmission lines.[14]

III.

THIS COURT HAS NOTED PROBABLE JURISDICTION IN KANSAS CASE INVOLVING AN ISSUE COMMON TO THIS CASE

Cities Service Gas Company v. *State Corporation Commission of Kansas*, Cause No. 85 on this Court's docket, is an appeal from a decision by the Supreme Court of Kansas[15] holding a Kansas Corporation Commission order fixing a minimum price on wellhead sales of gas-well gas destined for interstate movement to be a valid exercise of the State's conservation power

[13] Footnote 12 above.

[14] Commission Order No. 190, Docket R-144, 21 F. R. 7616, October 4, 1956.

[15] 180 Kan. 454, 304 Pac. 2d 528 (1956).

and not state regulation of a "sale in interstate commerce of natural gas for resale" within the meaning of the Natural Gas Act. The Kansas Commission set the minimum price "as a condition precedent for withdrawal [of gas] from the common source of supply [the Hugoton Field]."

The Supreme Court of Kansas distinguished *Phillips* and *Panoma*, *supra*, on the same ground which we discussed above, *i.e.*, that those cases involved wholesales of natural gas consummated after completion of production, gathering and processing. The minimum price order was found to be an incident of production and therefore exempt from federal regulation.

This Court has noted probable jurisdiction in the *Kansas* case. Although that case involves a state minimum price order and this case involves a wellhead sale of casinghead gas, the basic question in both cases is the extent of Federal Power Commission jurisdiction under the Act. The Court below would obviously hold that a wellhead sale of gas-well gas should be classed as "in" interstate commerce because of "continuous flow", and that "production or gathering" cover only the physical activities, facilities and properties used in production and gathering, exclusive of all sales. Under the decision below, therefore, control of the Kansas wellhead price would not come within the exemptive provision of § 1(b).

Thus, there is a conflict between the Kansas decision and the decision of the Court below as to the effect to be accorded the exemptive provision of § 1(b) of the Act. If this issue is to be reviewed by this Court in the *Kansas* case, we respectfully submit that it should also be reviewed in conjunction with the important but

differently faceted situation here involved. We do not imply that we consider the question of exemption of production or gathering under § 1(b) as the single or cardinal issue in our case. We believe the other questions discussed above to be of equal or greater importance, and each provides an adequate reason why *certiorari* should be granted here.

IV.

DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The Court below holds that sales of gas can never be considered a part of "production or gathering", but that this provision of § 1(b) of the Act covers only "the physical activities, facilities and properties used . . . in the production and gathering of natural gas".[16] This holding conflicts with the decision of this Court in *Panhandle Eastern, supra,* where a sale of gas in place was held to come within the "production or gathering" exemption. There, this Court rejected the Commission's contention that the § 1(b) exemption applied only to the activities of production and gathering and not to the transaction involved.

The decision of the Court below also concludes that processing of casinghead gas is not an interruption of the "continuous flow" of gas from the wellhead to the consumer burner tip, but is merely a part of the business of transporting and marketing gas in interstate commerce.[17] In support of this holding, the Court cites *City of Detroit* v. *Federal Power Commission,* 230 F. 2d 810, 820 (C. A. D. C., 1956), *cert.* den. 352 U. S. 829 (1957), to be compared with *Cities Service Gas Company* v. *Federal Power Commission,* 155

[16] App. 14a.

[17] App. 12a.

F. 2d 694, (C. A. 10, 1946) *cert.* den. 329 U. S. 773 (1947).

These cases are not in point for at least two reasons. In the first place, they involved pipeline-company-produced gas, movement of which was launched with the intent and knowledge that the gas would be transported in interstate commerce and sold for resale. Secondly, these cases primarily involved the question of determining the proper standard of rate regulation for companies which were admittedly making sales of natural gas in interstate commerce for resale. There was no question but that the Commission had jurisdiction to regulate the particular sales involved; the only issue relevant there was whether costs and revenues in connection with production operations could be considered by the Commission in determining the rate base and cost of service for the companies involved.

The holding that processing is not an interruption of the interstate flow of gas is in conflict with premises employed in at least two cases decided by this Court. In *Interstate, supra,* the Court was confronted with the contention by *Interstate* that its purchaser compressed the gas after receiving it from *Interstate* and that this compression constituted an interruption of the interstate flow of the gas, thereby making the sale in question local in character. The Court's holding was summarized in the following language:

> "The entire movement of the gas from the wells to the purchasing companies through the compressor pumps and across the state lines is a continuous process *without interruption for storage, processing or for any other purpose . . .*" (331 U. S. at 685; emphasis supplied).

Although compression was held not to interrupt the interstate flow of gas, the clear implication is that extraction processing, such as that involved here, would be such an interruption of flow as would make the sale local in character.

Michigan-Wisconsin Pipe Line Company v. *Calvert*, *supra*, involved a sale of residue gas at the outlet of a processing plant. Justice Clark, speaking for the Court, analogized extraction processing to the generation of electricity which this Court earlier in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (1932), had held to be "local in character." But he concluded that the sale in question was made after such processing and was, therefore, a sale in interstate commerce.[18]

From these expressions by this Court, it appears that processing is an interruption of "continuous flow" and that the holding of the Court below is in conflict with the principle of law which this Court considers applicable to a situation such as that here involved.

In the companion decisions which the Court below said were parallel in facts and decisive of this case, two statements were made which are not applicable here. One was that Deep South admitted "continuous flow" of its gas from the well to the burner tip (App. 11a). The other was that Shell's contract contained an express provision contemplating resale of its gas in interstate commerce. Humble made no such admission and has no such provision in its contracts involved here.

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[18] 347 U. S. 168, 169, particularly footnote 6.

CONCLUSION

We urge that this Petition for a Writ of *Certiorari* be granted for the reasons hereinabove set forth.

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Certificate of Service

I certify that the foregoing Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit was served upon Respondent, the Federal Power Commission, by mailing a copy thereof by United States mail, postage prepaid to each of the following attorneys for Respondent on the 13th day of September, 1957:

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